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NRDC Sues EPA for a Failure to Issue Hazardous Substance Regulations: The End of a Decades-Long Public Risk in Sight

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information that businesses might prefer to keep out of the public domain, and which they have been able to do during the disclosure and negotiations process that is currently in place. If it turns out that these concerns are well founded, the operations of the system itself are found too difficult to use, or the promised benefits do not materialize, EPA may find itself once again considering changes to the Audit Policy.

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NRDC SUES EPA FOR A FAILURE TO ISSUE HAZARDOUS SUBSTANCE REGULATIONS: THE END OF A DECADES-LONG PUBLIC RISK IN SIGHT

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Currently there are no federal regulations that prevent hazardous substance spills at onshore facilities, such as tank farms, or in communities where a spill of those chemicals could threaten water supplies. The U.S. Environmental Protection Agency (EPA) has the authority to issue spill prevention regulations for onshore facilities that hold hazardous substances in aboveground storage tanks (ASTs); in fact, EPA has been required to issue spill prevention regulations for such facilities since 1972. ASTs that contain hazardous substances can pose threats to millions of Americans because there is no universal measure to assess the tanks' integrity or ensure they will not leak. Years of exposure to weather deteriorate the tanks, and heighten the tanks' potential to release hazardous substances into water supplies.

On July 21, 2015, the Natural Resources Defense Council (NRDC) filed a complaint on behalf of the Environmental Justice Health Alliance for Chemical Policy Reform (EJHA) and People Concerned About Chemical Safety (PCCS) against EPA and EPA Administrator Gina McCarthy in her official capacity as administrator, in the U.S. District Court for the Southern District of New York. The case has been assigned to Judge Shira A. Sheindlin. The complaint alleges EPA is in violation of section 311(j)(1)(C) of the Clean Water Act (CWA), which gives EPA a non-discretionary duty to issue regulations to prevent spills and releases of hazardous substances from non-transportation-related onshore facilities. In addition, the complaint alleges EPA is in violation of two subsequent executive orders implementing that provision of the CWA. The plaintiffs seek a declaratory judgment that EPA is in violation of the CWA and an order compelling EPA immediately to begin a rulemaking and issue the required spill prevention regulations.

Some believe the complaint has a good chance of succeeding because the CWA mandates EPA to issue spill prevention regulations for onshore facilities with hazardous substances, and for equipment at onshore facilities that hold hazardous substances, such as ASTs, yet EPA has not done so. Although some argue EPA has ignored two executive orders enforcing section 311(j)(1)(C) of the CWA for years, it may be required to issue the regulations at the end of its battle with NRDC.

Section 311(j)(1)(C) of the CWA directs EPA "as soon as practicable" to issue regulations under the National Contingency Plan (NCP) to establish "procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and hazardous substances from [. . .] onshore facilities [. . .], and to contain such discharges." The prescribed regulations must establish procedures and methods to prevent *and* contain discharges of hazardous substances and oil from onshore facilities. They also must provide requirements for equipment at onshore facilities, such as ASTs.

Soon after Congress passed the bill in 1972, EPA issued regulations under the NCP to prevent oil spills that defined "non-transportation-related onshore and offshore facilities" for purposes of oil and included safety standards for ASTs containing oil. EPA passed regulations under the NCP in 1994 to contain oil and hazardous substance spills. While the 1994 regulations outline response procedures and cleanup measures and designate the U.S. Coast Guard as the first responder after a spill occurs, they do not prevent spills of either oil or hazardous substances. Although there are preemptive regulations under the NCP that set requirements for ASTs and other standards to prevent oil spills at onshore facilities, today there are no similar preemptive regulations for equipment holding hazardous substances or standards that prevent hazardous substance spills.

EPA likely focused on spill prevention regulations for oil in the 1970s because oil production in the United States peaked at 3.5 billion barrels per year in 1970. Between February 1970 and January 1971, four major oil spills occurred in the United States, and one in Canada. The total amount of oil spilled was 12.7 million gallons, and the total cleanup costs exceeded $15 million. These spills were not all from onshore facilities but they fueled the public's concern. The oil boom and resulting onshore pollution concerns overshadowed the congressional mandate to regulate onshore storage of chemicals.

Hazardous substance spills were far fewer in number than oil spills and drew much less public attention. In addition, data on the effects of hazardous substance spills were sparse, and the cleanup costs did not come close to those of oil spills. For example, in 1971 a storage pond on the Peace River in Florida released two billion gallons of sludge from phosphate mining operations that contaminated the Charlotte Harbor area for nearly 60 miles. Sludge remained at the bottom of the river through 1974, was continuously flushed by heavy rains, and repetitively contaminated the water. Also, in 1974, an herbicide manufacturing plant in Alliance, Ohio, caught fire, allowing hydrogen chloride and other toxic gases to escape and reach residential neighborhoods. EPA had to evacuate a hospital of 500 patients when the wind changed direction. The public saw hazardous substance releases as opportunities to react, and likely overlooked preventative measures for such incidents because oil spills continued to grow in number, followed by high cleanup costs and lost oil revenues.

Political obstacles also played a role in stymieing EPA's ability to issue spill prevention regulations. President Nixon oversaw the creation of EPA, signed the CWA, and supported EPA's issuance of spill prevention regulations for oil and hazardous substances. EPA proposed spill prevention regulations for oil in 1972 and for hazardous substances in 1973. Thereafter, the oil regulations were promulgated in 1976 under the Ford administration. The hazardous substance regulations were subsequently issued in 1978 under the Carter administration, yet the Manufacturing

Chemists Association successfully overturned the rule in the U.S. District Court for the Western District of Louisiana. Since then, EPA has not issued spill prevention regulations for hazardous substances.

One reason explaining why EPA has been slow to issue spill prevention regulations for hazardous substances is that today more than 90 percent of ASTs at onshore facilities hold petroleum products; the remaining 10 percent of ASTs with hazardous substances are mostly clustered in industrial areas. This statistic has lead to the mistaken belief that the number of people that would be affected by a discharge of hazardous substances from ASTs is relatively small. Although data show hazardous substance spills are likely to occur in industrial areas, spills travel fast and can go unnoticed; containment alone has proven to be an inadequate safety measure.

In 2014, when 10,000 gallons of 4-methylcyclohexanemethanol (MCHM) spilled into the Elk River in West Virginia, the harm associated with hazardous substance spills gained national attention. The Elk River spill occurred 1.5 miles from a drinking water intake that serves 300,000 West Virginians. Governor Earl Tomblin declared a state of emergency in nine counties, and banned those residents from using their tap water for drinking, cooking, washing, or bathing. The ban lasted for five days, and lasted up to ten days or longer for pregnant women and a small percentage of the residents. Although only 369 West Virginians sought medical treatment for symptoms such as nausea and itching, and 13 of those were hospitalized, the fear for the potential risks associated with hazardous substance spills still resonates with the population.

The absence of federal regulation has shifted the responsibility to regulate ASTs containing hazardous substances on the states. While some states had AST inspection regulations prior to the Elk River spill, West Virginia confronted its inadequate regulatory scheme head-on in 2014. Many states followed West Virginia, and successfully passed legislation that requires inspections of existing ASTs. Inconsistent state regulations create disarray for interstate industries, however, which can increase dangers to the public.

State-by-state regulations are not efficient as industrial standards because industries could be in compliance in one state, yet out of compliance in another. Industries are tasked with organizing each state's standards and staying in compliance. The increased potential for industry to be out of compliance increases the danger to the public. In light of this, some believe a single federal standard would be more efficient and effective in providing adequate protection for the public. Further, a federal standard would avoid federal/state redundancy because it would preempt state regulations.

The foregoing summary suggests that NRDC's request, if implemented, would allow EPA to maintain regulatory efficiency. Most importantly, a federal standard would fill the current void in federal regulations: while EPA passed regulations to contain oil and hazardous substance spills, and to prevent oil spills, it has not implemented regulations to prevent hazardous substance spills.

NRDC is winding up and will take the first crack in decades to ensure EPA implements the directive, preempts threats to water supplies, and protects the public from hazardous substance spills at onshore facilities.

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